

Exhibit 6

SUM-100

SUMMONS (CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

RESPONDENTS AND DEFENDANTS: "Additional Parties
Attachment form is attached."

YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTÁ DEMANDANDO EL DEMANDANTE):

PETITIONERS AND PLAINTIFFS: TRUST OF REGAN CARROLL,
REGAN CARROLL, TRUSTEE

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

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MAYORS OFFICE
06 NOV 30 PM 2:31

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:

(El nombre y dirección de la corte es):

Superior Court of San Francisco
400 McAllister Street
San Francisco, CA 94102-4514

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Thomas N. Lippe, SBN 104640

Law Offices of Thomas N. Lippe; 329 Bryant St., #3D, San Francisco, CA 94107; tel (415) 777-5600

CASE NUMBER:
(Número del Caso)

CPF-06-506816

DATE: NOV 27 2006
(Fecha)

Gordon Park-Li

Clerk, by
(Secretario)

Jun Panoio

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): CITY AND COUNTY OF SAN FRANCISCO

under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)

☒ other (specify): CCP 416.50 public entity

4. ☐ by personal delivery on (date):

Page 1 of 1

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Thomas N. Lippe, SBN #104640 LAW OFFICES OF THOMAS N. LIPPE 329 Bryant Street, Suite 3D, San Francisco, CA 94107 TELEPHONE NO.: 415-777-5600 FAX NO.: 415-777-9809 ATTORNEY FOR (Name): Petitioners and Plaintiffs		FOR COURT USE ONLY ENDORSED FILED San Francisco County Superior Court NOV 27 2006 GORDON PARK-LI, Clerk BY: <u>JUN P. DANFLO</u> Deputy Clerk	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: same CITY AND ZIP CODE: San Francisco, CA 94102-4514 BRANCH NAME:		CASE NUMBER: CPF-06-506816 JUDGE: DEPT:	
CASE NAME: Trust of Regan Carroll v City and County of San Francisco, et al			
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)		Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 1811)	

Items 1-5 below must be completed (see instructions on page 2).

1. Check **one** box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input checked="" type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 1800-1812) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case ☐ is ☒ is not complex under rule 1800 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

- | | |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input type="checkbox"/> Large number of witnesses |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence | f. <input type="checkbox"/> Substantial postjudgment judicial supervision |

3. Type of remedies sought (check all that apply):

- | | | |
|--------------------------------------|--|--------------------------------------|
| a. <input type="checkbox"/> monetary | b. <input checked="" type="checkbox"/> nonmonetary; declaratory or injunctive relief | c. <input type="checkbox"/> punitive |
|--------------------------------------|--|--------------------------------------|

4. Number of causes of action (specify): one (1)

5. This case ☐ is ☒ is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: November 27, 2006

Thomas N. Lippe

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 201.8.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 1800 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

CM-015

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Thomas N. Lippe, SBN 104640 Law Offices of Thomas N. Lippe 329 Bryant Street, Suite #3D San Francisco, CA 94107 TELEPHONE NO.: 415-777-5600 FAX NO. (Optional): 415-777-9809 E-MAIL ADDRESS (Optional): lippelaw@sonic.net ATTORNEY FOR (Name): Petitioners and Plaintiffs	FOR COURT USE ONLY ENDORSED FILED San Francisco County Superior Court NOV 27 2006 GORDON PARKER, Clerk BY <u>CAROLYN BALISTRERI</u>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: same CITY AND ZIP CODE: San Francisco, CA 94102-4514 BRANCH NAME:	
PLAINTIFF/PETITIONER: Trust of Regan Carroll, et al DEFENDANT/RESPONDENT: City and County of San Francisco, et al	CASE NUMBER: CPF-06-506816 JUDICIAL OFFICER:
NOTICE OF RELATED CASE	DEPT.:

The following case or cases are related to the above-captioned case:

1. a. Title: Trust of Regan Carroll v. City and County of San Francisco Department of Building Inspection, et al
 b. Court: ☒ same as above ☐ other (name and address):

c. Case number: CPF-06-506542

d. Filing date: August 4, 2006

e. Relationship to this case: see Attachment 1

- f. If the related case is pending in the same court as this case, explain why the assignment of the cases to a single judge is likely to result in efficiencies:

☒ Additional explanation is attached in Attachment 1.

2. a. Title:
 b. Court: ☐ same as above ☐ other (name and address):

c. Case number:

d. Filing date:

e. Relationship to this case:

- f. If the related case is pending in the same court as this case, explain why the assignment of the cases to a single judge is likely to result in efficiencies:

☐ Additional explanation is attached in Attachment 2.

3. ☐ Additional related cases are described in Attachment 3.

Date: November 27, 2006

Thomas N. Lippe

(TYPE OR PRINT NAME OF PARTY OR ATTORNEY)

(SIGNATURE OF PARTY OR ATTORNEY)

Page 1 of 2

NOTICE OF RELATED CASE

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NOTICE OF RELATED CASE
ATTACHMENT 1

PLAINTIFF: Trust of Regan Carroll, et al	CASE NUMBER:
DEFENDANT: City and County of San Francisco, et al	

The following case or cases are related to the above-caption case:

1. e. Relationship to this case:

Case No CPF-06-506542 involves the same parties and relates to Respondent City of San Francisco's procedures for reviewing the same building permit application that is the subject of this action.

1. f. If the related case is pending in the same court as this case, explain why the assignment of the cases to a single judge is likely to result in efficiencies:

Respondent City of San Francisco's has been processing Petitioner's Building Permit Application No. 9902819 since 1999. Since December of 2005, the City has refused to issue the permit despite fully approving the application. Case No CPF-06-506542 challenges the Building Inspection Commission's and Board of Appeal's denial of Petitioners administrative appeals, which sought to overturn the Department of Building Inspection's and Department of Planning's eleventh hour imposition of new permit approval requirement on Petitioner. The instant case seeks a judicial declaration that Building Permit Application No. 9902819 is deemed approved by operation of law under the Permit Streamlining Act; and a peremptory writ of mandate ordering the City to issue the building permit forthwith. Most of the underlying facts of the two cases, especially the factual history of the permit application from 1999 through December of 2005, is the same for both cases.

1 Thomas N. Lippe, Esq. SB #104640
2 Andrea Rosenthal, Esq. SB#154769
3 LAW OFFICES OF THOMAS N. LIPPE
329 Bryant Street, Suite 3D
4 San Francisco, California 94107
Tel: (415) 777-5600
Fax: (415) 777-9809

ENDORSED
FILED
San Francisco County Superior Court

NOV 27 2006

5 Attorneys for Petitioners and Plaintiffs:
6 Trust of Regan Carroll, Regan Carroll, Trustee

GORDON PARK-LI, Clerk
BY: JUN P. PANELO
Deputy Clerk

7
8
9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 CITY AND COUNTY OF SAN FRANCISCO

11
12 TRUST OF REGAN CARROLL, REGAN)
13 CARROLL, TRUSTEE,)

14 Petitioners and Plaintiffs,)

15 v.)

16 CITY AND COUNTY OF SAN FRANCISCO;)
17 CITY AND COUNTY OF SAN FRANCISCO)
18 DEPARTMENT OF BUILDING INSPECTION,)
AND CITY OF COUNTY OF SAN FRANCISCO)
19 PLANNING DEPARTMENT,)

20 Respondents and Defendants.)
21
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Case No. CPF-06-506816

PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR
DECLARATORY RELIEF

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1 Petitioners and Plaintiffs TRUST OF REGAN CARROLL and REGAN CARROLL,
 2 TRUSTEE (hereinafter collectively referred to as "Mr. Carroll") allege as follows:

3 1. This case arise from the failure by Respondent and Defendant CITY AND COUNTY OF
 4 SAN FRANCISCO (hereinafter the "City") to timely approve Building Permit Application No.
 5 9902819 and issue a building permit to Mr. Carroll in violation of the Permit Streamlining Act at
 6 Government Code § 65920 *et seq.* Mr. Carroll seeks a judicial declaration that the City's refusal to
 7 issue said permit is unlawful and that Building Permit Application No. 9902819 is deemed approved
 8 by operation of law; and a peremptory writ of mandamus ordering the City to issue to Mr. Carroll the
 9 building permit for Building Permit Application No. 9902819 forthwith.

10 I. THE PARTIES

11 2. Petitioners and Plaintiffs TRUST OF REGAN CARROLL and REGAN CARROLL,
 12 TRUSTEE (hereinafter collectively referred to as "Mr. Carroll") are the owners of real property
 13 located in the City and County of San Francisco commonly known as 1179-1189 Tennessee Street,
 14 which is located in the Dogpatch neighborhood of San Francisco. The real property commonly
 15 known as 1179-1189 Tennessee Street is hereinafter referred to as the "Property."

16 3. Respondent and Defendant CITY AND COUNTY OF SAN FRANCISCO is a municipal
 17 organization organized and existing under the Constitution and laws of the State of California.
 18 Respondent and Defendant CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF
 19 BUILDING INSPECTION ("DBI") is an agency of the City established by City Charter § D3.750
 20 having "responsibility for the enforcement, administration, and interpretation of the City's Housing,
 21 Building, Mechanical, Electrical, and Plumbing Codes...." Respondent and Defendant CITY OF
 22 COUNTY OF SAN FRANCISCO PLANNING DEPARTMENT ("Planning Department") is an
 23 agency of the City created by San Francisco City Charter § 101 "to administer and enforce the City
 24 Planning Code." City, DBI, and the Planning Department are collectively referred to herein as
 25 "City."

26 II. FACTUAL BACKGROUND

27 4. On or about February 11, 1999, Mr. John Stricklin, the then current owner of the Property,
 28 submitted Building Permit Application No. 9902819 to the City for a permit to construct a four (4)

1 story, eight (8) unit residential building on the Property. Mr. Stricklin's application included a
2 request for a variance because the proposed building would encroach on the rear yard setback
3 required by the San Francisco Planning Code.

4 5. On or about July 28, 1999, the Planning Department issued for public review and comment
5 a Negative Declaration prepared pursuant to the California Environmental Quality Act (hereinafter
6 "CEQA") for Mr. Stricklin's application. The Negative Declaration evaluated potential effects on
7 historic resources and found them to be "not significant," stating: "[i]n the independent judgment of
8 the Department of City Planning, there is no substantial evidence that the project could have a
9 significant effect on the environment."

10 6. On or about August 10, 1999, the Planning Department adopted the Negative Declaration and
11 approved the variance request.

12 7. On March 31, 2000, Mr. Carroll acquired title to the Property.

13 8. On or about March 31, 2000, Mr. Carroll acquired pending Building Permit Application No.
14 9902819 by assignment from Mr. Stricklin. Mr. Carroll re-designed the proposed building to
15 eliminate the need for a rear yard variance by removing a portion of rear of the building and reducing
16 the overall building envelope.

17 9. The Permit Streamlining Act ("PSA"), at Government Code § 65943, requires the permit
18 issuing agency to notify the applicant when and why an application is "incomplete" and also when
19 it is "complete." On or about June 26, 2001, the City approved the Site Permit plans for Building
20 Permit Application No. 9902819 and provided notice to Mr. Carroll that the Building Permit
21 Application No. 9902819 was complete for purposes of the PSA.

22 10. Under the PSA at Government Code § 65944, once the permit issuing agency accepts the
23 application as complete, it cannot require that the applicant submit any new categories of information
24 not previously identified, though the agency may "in the course of processing the application, request
25 the applicant to clarify, amplify, correct, or otherwise supplement the information required for the
26 application."

27 11. Between June 26, 2001 and November of 2005, the City requested and Mr. Carroll provided
28 additional supplemental information for purposes of the City's review and approval of various

1 "Technical Addenda" to the Site Permit plans for Building Permit Application No. 9902819 relating
 2 to mechanical, structural and other matters specified by the San Francisco Building Code.

3 12. On or about June of 2005 and again on or about November 14, 2005 the City approved all of
 4 the required Technical Addenda for Building Permit Application No. 9902819.

5 13. On or about November 14, 2005 the City notified Mr. Carroll that his permit was ready for
 6 issuance upon proof of payment to the San Francisco Unified School District of school facilities fee.

7 14. On December 2, 2005, Mr. Carroll paid the school facilities fee, appeared at the City's Central
 8 Permit Bureau, presented his receipt for payment of the school facilities fee and requested that his
 9 building permit be issued. The City refused to issue the requested building permit to Mr. Carroll.

10 15. Since its refusal to issue the requested building permit to Mr. Carroll December 2, 2005, the
 11 City has informed Mr. Carroll that it will not issue the requested building permit and will deny
 12 Building Permit Application No. 9902819 unless and until he submits to the City for its discretionary
 13 approval an application for a Certificate of Appropriateness pursuant to Article 10 of the San
 14 Francisco Planning Code.

15 16. Article 10 of the San Francisco Planning Code is the City's historic preservation ordinance,
 16 adopted in 1967. Article 10 requires the submission and approval of an application for a Certificate
 17 of Appropriateness for certain development projects located in areas of the City that have been
 18 designated as "historic districts." On April 18, 2003, almost two years after the City found the
 19 application and approved the Site Permit, the City designated the Dogpatch neighborhood in which
 20 Mr. Carroll's property is located as a "historic district" by adopting Appendix L to Article 10.

21 17. At no time before December 2, 2005 did the City ever inform Mr. Carroll that he would be
 22 required to submit to the City for its discretionary approval an application for a Certificate of
 23 Appropriateness pursuant to Article 10 of the San Francisco Planning Code.

24 III. FIRST CAUSE OF ACTION

25 18. Petitioner hereby realleges and incorporates the preceding paragraphs of this Petition as
 26 though set forth herein in full.

27 19. The Permit Streamlining Act was enacted in 1977, when the California Legislature added
 28 chapter 4.5, entitled "Review and Approval of Development Projects," to the Government Code,

1 commencing with section 65920. The Act's purpose, as stated in Government Code §65921, is to
2 "ensure clear understanding of the specific requirements which must be met in connection with the
3 approval of development projects and to expedite decisions on such projects." The Act was adopted
4 to relieve permit applicants from protracted and unjustified governmental delays in processing their
5 applications for development projects. *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049.

6 20. Mr. Carroll's Building Permit Application No. 9902819 is a development project subject to
7 the PSA.

8 21. Under the PSA at Government Code § 65940, the City is required to compile one or more lists
9 specifying in detail the information required for review and approval of an application for a
10 development project, and to make such lists available to all applicants and to anyone else who
11 requests them. The lists must indicate the criteria that will be applied in determining whether an
12 application is complete, and the time limits for the review and approval of the applications.
13 (Government Code §§ 65941, 65941.5; *Beck Dev. Co. v. Southern Pac. Transp. Co.* (1996) 44
14 Cal.App.4th 1160, 1198.)

15 22. The City's insistence that Mr. Carroll submit to the City for its discretionary approval an
16 application for a Certificate of Appropriateness pursuant to Article 10 of the San Francisco Planning
17 Code violates the PSA at Government Code § 65944 because it requires information that was not
18 specified in any list compiled by the City pursuant to the PSA at Government Code § 65940 before
19 the City found Building Permit Application No. 9902819 complete.

20 23. Under the PSA at Government Code §§ 65941 and 69550(a)(3), the permit issuing agency
21 may take steps to comply with CEQA. Here, as noted above, the City complied with CEQA for
22 Building Permit Application No. 9902819 by adopting a Negative Declaration on or about July 28,
23 1999.

24 24. Under the PSA at Government Code § 65950(a)(3), once the permit issuing agency accepts
25 the application as complete and adopts a Negative Declaration pursuant to CEQA, the agency must
26 approve or disapprove the development application within sixty days thereafter. Here, the City failed
27 to approve or disapprove Building Permit Application No. 9902819 within this time limit.

28 25. On or about July 18, 2006, Mr. Carroll notified the City that it was in violation of the PSA.

26. Under the PSA at Government Code § 65956, where the permit issuing agency violates the time limits required by the PSA by failing to approve or disapprove the development application within sixty days after accepting the application as complete and adopting a Negative Declaration pursuant to CEQA, the applicant may give notice to the agency and the affected members of the public that unless the agency approves or disapprove the development application within sixty days of the notice, the application will be deemed approved by operation of law.

27. On or about August 9, 2006, Petitioner complied with the PSA at Government Code § 65956(b) by providing the City with seven days advance notice that Petitioner intended to provide public notice that the Project would be deemed approved by operation of law if the City did not approve or disapprove Building Permit Application No. 9902819 within sixty days of said public notice.

28. On August 30, 2006, pursuant to the PSA at Government Code § 65956(b), Petitioner provided the City and the public with notice that the Project would be deemed approved by operation of law if the City did not approve or disapprove Building Permit Application No. 9902819 within sixty days of said public notice.

29. Under the PSA at Government Code § 65956(b), where the permit issuing agency fails to approve or disapprove the development application within sixty days after the notice specified in Government Code § 65956(b) is given, the application is deemed approved by operation of law.

30. The City failed to approve or disapprove Building Permit Application No. 9902819 within sixty days of said public notice.

31. Mr. Carroll has attempted on several occasions to informally resolve these issues with the City, to no avail.

IV. PRAYER FOR RELIEF

WHEREFORE, Mr. Carroll prays for relief as follows:

1. For judicial determinations and declarations that:

a. the City's refusal to approve Building Permit Application No. 9902819 and issue said permit is unlawful and in violation of the PSA; and

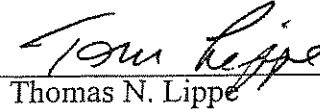
b. Building Permit Application No. 9902819 is deemed approved by operation of law.

2. For a peremptory writ of mandate ordering the City to issue to Mr. Carroll the building permit for Building Permit Application No. 9902819 forthwith.
3. For reasonable attorney's fees under Government Code § 800;
4. For costs of suit; and
5. For such other and further relief as the court deems proper.

DATED: November 27, 2006

LAW OFFICES OF THOMAS N. LIPPE

By:



Thomas N. Lippe
Attorney for Petitioners and Plaintiffs
Trust of Regan Carroll and Regan Carroll, Trustee

P030b Petition for Writ.wpd

VERIFICATION

Trust of Regan Carroll v. City and County of San Francisco, et. al., San Francisco County Superior Court, Case No. [Unassigned]

I, Regan Carroll, declare:

I am a Petitioner/Plaintiff in this action. I have read the foregoing Petition for Writ of Mandate and Complaint for Declaratory Relief and know the contents thereof, the factual allegations therein are true of my own knowledge.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on the 27TH day of November, 2006 at Smith River, California.



Regan Carroll, TRUSTEE
TRUST OF REGAN CARROLL

Exhibit 7

SUMMONS (CITACION JUDICIAL)

SUM-100

NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO BOARD OF APPEALS, RANDALL KNOX, MICHAEL GARCIA, KATHERINE ALBRIGHT, FRANK FUNG, ROBERT HAALAND, (In their capacity as Members of the Board of Appeals) and DOES 1 through 20, inclusive

YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

REGAN CARROLL TRUST, Regan Carrol, trustee,

FOR COURT USE ONLY
RESOLVED BY COURT OF THE COURT
MAYOR'S OFFICE

07 JUL 23 PM 4:17

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:

(El nombre y dirección de la corte es):

San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102
Unlimited Civil Jurisdiction

CASE NUMBER
(Número del Caso) **CC07-463565**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Andrew M. Zacks, (SBN 147794) 415-956-8100 415-288-9755

ZACKS UTRECHT & LEADBETTER, PC

235 Montgomery Street, Suite 400

San Francisco, CA 94104

DATE: 5/21/2007

(Fecha)

GORDON PART-11 f -
Clerk, by *[Signature]*
(Secretario)

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons (POS-010).)

NOTICE TO THE PERSON SERVED: You are served

☐ as an individual defendant.

☐ as the person sued under the fictitious name of (specify):

3. ☐ on behalf of (specify):

under: ☐ CCP 416.10 (corporation)

☐ CCP 416.20 (defunct corporation)

☐ CCP 416.40 (association or partnership)

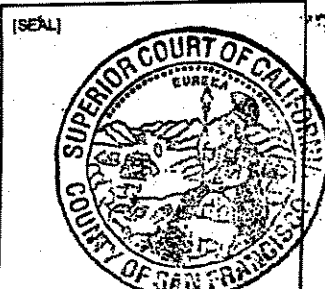
☐ other (specify):

4. ☐ by personal delivery on (date):

☐ CCP 416.60 (minor)

☐ CCP 416.70 (conservatee)

☐ CCP 416.90 (authorized person)



City & County of San Francisco City Attorney's Office
Litigation Log Sheet

File # 080138
Case Name Regan Carroll Trust, Regan Carroll, Trustee

From Case: 070412

Disposition

Full Caption

Trust of Regan Carroll, Regan Carroll, Trustee v. CCSF, SF Board of Appeals, et al and Does 1-20, inclusive

Department: PAB: PAB Board of Appeals

Cause Code: Miscellaneous

Subject

CASE NUMBER: CGC-07-463565 REGAN CARROLL et al VS. CITY AND COUNTY OF SAN FRA

NOTICE TO PLAINTIFF

A Case Management Conference is set for:

DATE: OCT-19-2007

TIME: 9:00AM

**PLACE: Department 212
400 McAllister Street
San Francisco, CA 94102-3680**

All parties must appear and comply with Local Rule 3.

CRC 3.725 requires the filing and service of a case management statement form CM-110 no later than 15 days before the case management conference.

However, it would facilitate the issuance of a case management order **without an appearance** at the case management conference if the case management statement is filed, served and lodged in Department 212 twenty-five (25) days before the case management conference.

Plaintiff must serve a copy of this notice upon each party to this action with the summons and complaint. Proof of service subsequently filed with this court shall so state.

ALTERNATIVE DISPUTE RESOLUTION POLICY REQUIREMENTS

IT IS THE POLICY OF THE SUPERIOR COURT THAT EVERY CIVIL CASE PARTICIPATE IN EITHER MEDIATION, JUDICIAL OR NON-JUDICIAL ARBITRATION, THE EARLY SETTLEMENT PROGRAM OR SOME SUITABLE FORM OF ALTERNATIVE DISPUTE RESOLUTION PRIOR TO A MANDATORY SETTLEMENT CONFERENCE OR TRIAL.
(SEE LOCAL RULE 4)

Plaintiff must serve a copy of the Alternative Dispute Resolution Information Package on each defendant along with the complaint. All counsel must discuss ADR with clients and opposing counsel and provide clients with a copy of the Alternative Dispute Resolution Information Package prior to filing the Case Management Statement.

[DEFENDANTS: Attending the Case Management Conference does not take the place of filing a written response to the complaint. You must file a written response with the court within the time limit required by law. See Summons.]

Superior Court Alternative Dispute Resolution Coordinator
400 McAllister Street, Room 103
San Francisco, CA 94102
(415) 551-3876

See Local Rules 3.6, 6.0 C and 10 D re stipulation to commissioners acting as temporary judges

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Andrew M. Zacks (SBN 147794) Zacks, Utrecht & Leadbetter, PC 235 Montgomery Street, Suite 400 San Francisco, CA 94104 TELEPHONE NO.: 415-956-8100 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Trust of Regan Carroll		FOR COURT USE ONLY RECEIVED MAYOR'S OFFICE 07 JUL 23 PM 4:17
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: CITY AND ZIP CODE: San Francisco, CA 94102 BRANCH NAME: Unlimited Civil Jurisdiction		
PETITIONER/PLAINTIFF: Trust of Regan Carroll, Regan Carroll Trustee RESPONDENT/DEFENDANT: City and County of San Francisco, et al.		CASE NUMBER: 463565
PROOF OF SERVICE—CIVIL Check method of service (only one): <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input type="checkbox"/> By Overnight Delivery <input checked="" type="checkbox"/> By Messenger Service <input type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail/Electronic Transmission		JUDGE: DEPT.:

(Do not use this Proof of Service to show service of a Summons and Complaint.)

1. At the time of service I was over 18 years of age and not a party to this action.

2. My address is (specify one):

a. ☒ Business: 235 Montgomery St. Suite 400 b. ☐ Residence:
 San Francisco, CA 94104

3. On (date): 7/23/2007 I served the following documents (specify): Complaint for Injunction and
 Declaratory Relief, Summons, Notice to Plaintiff

☐ The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

4. I served the documents on the persons below, as follows:

a. Name of person served:

b. Address of person served:

c. Fax number or e-mail address of person served, if service was by fax or e-mail:

d. Time of service, if personal service was used:

☒ The names, addresses, and other applicable information about the persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

5. The documents were served by the following means (specify):

a. ☐ By personal service. I personally delivered the documents to the persons at the addresses listed in item 4.
 (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

CASE NAME Trust of Regan Carroll v. CCSF

CASE NUMBER:

463565

5 b. ☐ By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and (specify one):

(1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

(2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state):

c. ☐ By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 4. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

d. ☒ By messenger service. I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 4 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)

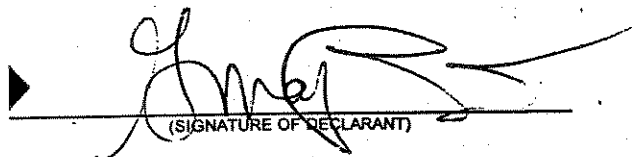
e. ☐ By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 4. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

f. ☐ By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed in item 4. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 7/23/2007

Gina Robertson
(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

(If item 5d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

☐ By personal service. I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 4. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (date): 7/23/2007

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 7/23/2007

LANCE MITCHELL
(NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

POS-040(P)

SHORT TITLE: Regan Carroll Trust v. CCSF et al.

CASE NUMBER:

463565

ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)*(This Attachment is for use with form POS-040)***NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:**Name of Person ServedAddress (business or residential),Fax, or E-mail (as applicable) Where ServedTime of Service
(for personal service)

Office of the Mayor	City Hall, Room 200 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102	Time: _____
Board of Appeals	1660 Mission Street San Francisco, CA 94103	Time: _____
Kristin Jensen	City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102	Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____

1 ANDREW M. ZACKS (CA# 147794)
2 JAMES B. KRAUS (CA# 184118)
3 ZACKS UTRECHT & LEADBETTER
4 235 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 956-8100

5 Attorneys for plaintiff Regan Carroll Trust

6 SUPERIOR COURT - STATE OF CALIFORNIA

7 COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

8 REGAN CARROLL TRUST, Regan
9 Carroll, trustee,

10 Plaintiff,

11 v.

12 CITY AND COUNTY OF SAN
13 FRANCISCO, SAN FRANCISCO
14 BOARD OF APPEALS,
15 RANDALL KNOX, MICHAEL GARCIA,
16 KATHERINE ALBRIGHT, FRANK
17 FUNG, ROBERT HAALAND, (In their
capacity as Members of the Board of
Appeals) and DOES 1 through 20,
inclusive,

18 Defendants.

FILED
San Francisco County Superior Court

MAY 21 2007

GORDON PARK-LI, Clerk

Deputy Clerk

OCT 19 2007 - 9:40 AM

DEPARTMENT 12

SUMMONS ISSUED

CASE NO. 07-463565

COMPLAINT FOR INJUNCTION
AND DECLARATORY RELIEF

(Cal Gov. Code § 54950, et seq.)

RECEIVED
MAYOR'S OFFICE
07 JUL 23 PM 4:17

20 INTRODUCTORY ALLEGATIONS

21 1. Plaintiff Regan Carroll Trust is a private trust established in the state of
22 California. Regan Carroll is its trustee. The trust owns the real property, located at
23 1179-1189 Tennessee Street, San Francisco (the "Premises") which is the subject of
24 the permit at issue in this action, and venue is proper in this judicial district.

25 2. Defendant City and County of San Francisco ("City") is a municipal
26 agency of the State of California. San Francisco Board of Appeals ("Board of
27
28

1 Appeals"), is appointed by the City Board of Supervisors and is responsible under
2 the City Charter and the San Francisco Administrative Code for review of building
3 permits granted by the San Francisco Planning Department. As such, the Board of
4 Appeals is a legislative body of a local agency within the definition of the California
5 Public Meetings Law, Government Code Section 54950, et seq. (the "Ralph M.
6 Brown Act") and is subject to the San Francisco Administrative Code, Chapter 67,
7 (the "Sunshine Ordinance").
8

9 3. Named Board of Appeal members, Randall Knox, Michael Garcia,
10 Katherine Albright, Frank Fung, Robert Haaland, were nominadted by the Mayor of
11 the City and County of San Francisco or the President of the Board of Supervisors
12 and approved by the Board of Supervisors pursuant to San Francisco City Charter
13 §4.106. The Board of Appeals is a legislative body of a local agency under the Brown
14 Act and the Sunshine Ordinance and the individual members are responsible for the
15 observance of those laws.
16

17 4. Plaintiff is ignorant of the true names and capacities of defendants
18 sued herein as Does one through twenty, inclusive, and therefore sues these
19 defendants by such fictitious names. Plaintiff will amend this complaint to allege
20 their true names and capacities when ascertained. Plaintiff is informed and believes
21 and thereon alleges that each of these fictitiously named defendants are responsible
22 in some manner for the occurrences herein alleged, and that plaintiff's injuries as
23 herein alleged were proximately caused by the aforementioned defendants.
24

25 5. Underlying this complaint is a construction permit application Plaintiff
26 had filed with the City's Planning Department and which was denied.
27
28

6. On March 7, 2006, Board of Appeals met and denied Plaintiff's appeal of the denial of the building permit. On April 4, 2006, a rehearing was held and the denial upheld. On, April 6, 2006 Plaintiff served a Cure and Correct demand letter for violations identified at the March 7 meeting. On May 6, 2006 the cure and correct period expired for the letter.

FIRST CAUSE OF ACTION

(Violation of Brown Act & Sunshine Ordinance, Illegal Seriatim Meeting)

7. Plaintiff realleges and incorporates by reference paragraphs 1 through 6 above.

8. The Ralph M. Brown Act at Gov. Code §54953(a) provides that:

"All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."

9. The San Francisco Sunshine Ordinance at Admin. Code, Section 67.5 provides that:

"All meetings of any policy body shall be open and public, and governed by the provisions of the Ralph M. Brown Act (Government Code Sections 54950 et. seq.) and of this article. In case of inconsistent requirements under the Brown Act and this article, the requirement which would result in greater or more expedited public access shall apply."

10. At the meeting of March 7, 2007, when requested to disclose advice from the City Attorney and to consider recusal of the City Attorney for conflict of interest, the defendant members of the Board of Appeals indicated that contacts have taken place with the City Attorney and that they are entitled to keep such contacts private. Such contacts constitute a seriatim meeting in violation of the

provisions of the Brown Act and Sunshine Ordinance set forth above.

SECOND CAUSE OF ACTION

(Violation of Brown Act & Sunshine Ordinance, Improper Closed Session)

11. The allegations of paragraphs 1 through 10 are realleged and incorporated herein by reference.

12. The Ralph M. Brown Act at Gov. Code §54954.2(a)(1) provides as follows:

"At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session."

13. The Ralph M. Brown Act at Gov. Code §54957.1(a) provides as follows:

"The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows"

14. The San Francisco Sunshine Ordinance at 67.8(a) provides as follows:

"In addition to the brief general description of items to be discussed or acted upon in open and public session, the agenda posted pursuant to Government Code Section 54954.2, any mailed notice given pursuant to Government Code Section 54954.1, and any call and notice delivered to the local media and posted pursuant to Government Code Section 54956 shall specify and disclose the nature of any closed sessions by providing all of the following information."

15. In addition, the Sunshine ordinance provides for a list of permitted topics at "Section 67.10, Closed Sessions: Permitted Topics," specifies the extent of disclosure of justifications for the closed sessions at "Sec. 67.11. Statement Of Reasons For Closed Sessions," and requires a disclosure of action and a vote to

1 Sunshine Ordinance the Board of Appeals and its members are required to meet only
2 at publicly noticed times and place where public attendance is allowed;

3 4. For a declaration stating that under the Brown Act and the
4 Sunshine Ordinance the Board of Appeals and its members are required to hold all
5 closed sessions meetings at the time and place described in the notice;

6
7 5. For an order directing that all contacts between the City Attorney and
8 members of the defendant Board of Appeals be fully disclosed;

9 6. For attorneys fees incurred in the prosecution of this action in the
10 public interest;

11 7. For costs of suit herein incurred; and

12 8. For such other and further relief as this Court deems fair, just and
13 equitable.
14

15
16 Date: May 21, 2007

ZACKS UTRECHT & LEADBETTER, P.C.

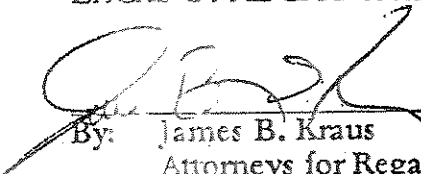
17
18
19 By:  _____
20 James B. Kraus
21 Attorneys for Regan Carroll
22
23
24
25
26
27
28

Exhibit 8

ENDORSED
FILED

San Francisco County Superior Court

MAY 09 2007

GORDON PARK-LI, Clerk

BY: MARY ANN MORAN
Deputy Clerk

DENNIS J. HERRERA, State Bar #139669
City Attorney
KRISTEN A. JENSEN, State Bar #130196
THOMAS S. LAKRITZ, State Bar #161234
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Telephone: (415) 554-4615
Facsimile: (415) 554-4757
E-Mail: kristen.jensen@sfgov.org

Attorneys for Respondent
CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

TRUST OF REGAN CARROLL,
REGAN CARROLL, TRUSTEE

Petitioner,

vs.

CITY AND COUNTY OF SAN
FRANCISCO DEPARTMENT OF
BUILDING INSPECTION, CITY AND
COUNTY OF SAN FRANCISCO
BUILDING INSPECTION
COMMISSION, CITY AND COUNTY
OF SAN FRANCISCO PLANNING
DEPARTMENT, CITY AND COUNTY
OF SAN FRANCISCO BOARD OF
APPEALS,

Respondents.

Case No. CPF-06-506542

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER TO AMENDED
PETITION FOR WRIT OF MANDATE
AND ADMINISTRATIVE
MANDAMUS

Hearing Date: June 12, 2007
Hearing Judge: Hon. Patrick J. Mahoney
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 12, 2006
Trial Date: None Assigned

Attached Documents: Doc Names

TABLE OF CONTENTS

1			
2	TABLE OF AUTHORITIES	ii	
3	INTRODUCTION	1	
4	STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	3	
5	I. THE PROPOSED PROJECT.	3	
6	II. AMENDMENT OF THE PLANNING CODE APPLICABLE TO NEW		
7	CONSTRUCTION IN THE DOGPATCH HISTORIC DISTRICT.	4	
8	III. CITY REVIEW OF THE APPLICATION FOR CONSISTENCY WITH		
9	APPENDIX L.	5	
10	IV. ADMINISTRATIVE APPEALS OF THE PLANNING DEPARTMENT'S		
11	ACTION.	6	
12	A. APPEAL OF THE REASSERTION OF PLANNING		
13	DEPARTMENT JURISDICTION TO THE BUILDING		
14	INSPECTION COMMISSION.....	6	
15	B. APPEAL OF THE ZA DETERMINATION TO THE BOARD OF		
16	APPEALS.	6	
17	V. COMMENCEMENT OF THE WRIT ACTION.....	7	
18	ARGUMENT.....	7	
19	I. LEGAL STANDARD.....	7	
20	II. THE AMENDED PETITION FAILS TO STATE A CLAIM FOR WHICH		
21	RELIEF CAN BE GRANTED.	7	
22	A. Petitioner is Not Entitled to Issuance of A Permit in Violation of the		
23	Planning Code.....	8	
24	B. Even if the Project Were in Compliance With the Planning Code,		
25	Petitioner is Not Entitled to Issuance of a Permit as a Matter of Right.	10	
26	III. THE AMENDED PETITION IS TIME BARRED PURSUANT TO		
27	GOVERNMENT CODE SECTION 65009.....	12	
28	A. The Building Inspection Commission and Board of Appeals		
	Determinations are Subject to the Statute of Limitations Set Forth in		
	Government Code § 65009	12	
	B. Limitations Statutes On Actions Challenging Local Planning		
	Decisions Are Strictly Construed.....	13	
	CONCLUSION.....	14	

TABLE OF AUTHORITIES**State Cases**

<i>Blank v. Kirwan</i> (1985) 39 Cal.3d 311	14
<i>Ching v. San Francisco Bd. of Permit Appeals</i> (1998) 60 Cal.App.4th 888	13
<i>Dodd v. Citizens Bank of Costa Mesa</i> (1990) 222 Cal.App.3d 1624	7
<i>Guinnane v. San Francisco City Planning Commission</i> (1989) 209 Cal.App.3d 732	11
<i>Hensler v. City of Glendale</i> (1994) 8 Cal.4th 1	13
<i>Land Waste Management v. Contra Costa Board of Supervisors</i> (1990) 222 Cal. App.3d 950	1, 9
<i>Lindell Co. v. Board of Permit Appeals</i> (1943) 23 Cal.2d 303	11, 12
<i>Maginn v. City of Glendale</i> (1999) 72 Cal.App.4th 1102	13
<i>Russian Hill Imp. Ass'n v. Board of Permit Appeals of City and County of San Francisco</i> (1967) 66 Cal.2d 34	2, 8, 9
<i>Selby Realty Co. v. City of San Buenaventura</i> (1973) 10 Cal.3d 110	8, 9, 10
<i>Travis v. County of Santa Cruz</i> (2004) 33 Cal.4th 757	13
<i>Wagner v. City of South Pasadena</i> (2000) 78 Cal.App.4th 943	13, 14
<i>Washington v. County of Contra Costa</i> (1995) 38 Cal.App.4th 890	7
<i>Wells Fargo Bank v. Town of Woodside</i> (1983) 33 Cal.3d 379	8, 9
<i>West Coast Advertising v. City and County of San Francisco</i> (1967) 256 Cal.App.2d 357	9, 10
<i>Wolfe v. State Farm & Casualty Insurance Co.</i> (1996) 46 Cal.App.4th 554	7

State Statutes & Codes

1	California Code of Civil Procedure	
2	§ 1013(a)	14
3	California Code of Civil Procedure	
4	§ 1085	12
5	California Code of Civil Procedure	
6	§ 1094.5	12
7	California Code of Civil Procedure	
8	§ 430.10	7
9	California Code of Civil Procedure	
10	§ 1094.6	7, 12
11	California Code of Civil Procedure	
12	§ 1109	7
13	California Government Code	
14	§ 65009	6, 12, 13, 14
15	California Government Code	
16	§ 65901	13
17	California Government Code	
18	§ 65903	13
19	San Francisco Statutes, Codes & Ordinances	
20	Planning Code	
21	§ 1005	4
22	San Francisco Building Code	
23	§ 106.4.3	1, 2, 6, 9
24	San Francisco Charter	
25	§ 3.100	3, 7
26	San Francisco Municipal Code	
27	Part II, Article 1, Section 26	2
28	San Francisco Planning Code	
	§ 1006	4
	San Francisco Planning Code	
	§ 1006.2	4
	San Francisco Business and Tax Regulation Code	
	§ 26	11

Respondent City and County of San Francisco (sued herein as the San Francisco Department of Building Inspection, San Francisco Building Inspection Commission, San Francisco Planning Department and San Francisco Board of Appeals; collectively "City") submits this memorandum of points and authorities in support of its demurrer to the Amended Petition for Writ of Mandate ...and Writ of Administrative Mandamus ("Amended Petition"), filed herein on September 12, 2006.

INTRODUCTION

In this action, Petitioner seeks an order from the Court compelling the City to issue a building permit for a proposed four story, eight unit residential building with commercial units on the ground floor ("Project"). Petitioner's property is located in the area designated as the Dogpatch Historic District of San Francisco. The building permit application for the Project ("Application"), initially filed in 1999, was then pursued sporadically by Petitioner over the next several years as his personal circumstances permitted. Petitioner admits that the Planning Code was amended during the protracted pendency of the Application, and now requires that all projects proposed for the Dogpatch Historic District be reviewed for consistency with applicable Planning Code provisions prior to issuance of the permit. Such review, which takes the form of a Certificate of Appropriateness, was never sought or received by Petitioner. In fact, Petitioner argues that the Project should not be required to comply with otherwise applicable changes in the Planning Code that were enacted subsequent to the filing of its Application, but prior to final issuance of the building permit. Petitioner's arguments are contrary to well-established law and, as a result, the Amended Petition should be dismissed without leave to amend.

"Under established law local government agencies are *powerless* to issue land-use permits which are inconsistent with governing legislation." (*Land Waste Management v. Contra Costa Board of Supervisors* (1990) 222 Cal. App.3d 950, 959 (italics in original).) This includes permits that would be in violation of planning and zoning ordinances [*Id.*] Similarly, San Francisco Building Code § 106.4.3 prohibits issuance of building permits that are not in conformity with the Planning Code and all other applicable law. Any permit issued in violation of the Planning Code is legally invalid and may be set aside as ultra vires. (*Land Waste Management, supra* 222 Cal App.

3d at 958.) As a result, it is a well-settled principle of administrative law that, until a permit is finally granted, the Building and Planning Departments, and all administrative agencies and courts considering a permit application, must apply the Planning Code in effect at the time of review. Applying this principal, the California Supreme Court has long held that "one who is not yet armed with a presently effective municipal license to proceed with construction must assume the risk that, 'before final action [has] been taken on [his] application' [citation omitted], the law might be changed so as to require that his application be denied." (*Russian Hill Imp. Ass'n v. Board of Permit Appeals of City and County of San Francisco* (1967) 66 Cal.2d 34, 40.)

Even in the absence of these authorities, the relief Petitioner seeks is not available, because this Court cannot usurp the City's independent discretion and compel issuance or denial of a permit that is the subject of such discretion. At most, the Court could order that the City *exercise its discretion* and either grant or deny the permit, as provided by Part II, article 1, section 26 of the San Francisco Municipal Code ("Section 26"), and render a decision to issue or deny the requested permit.

Finally, each of Petitioner's claims is barred by the applicable statute of limitations. The first cause of action challenges a decision by the City's Building Inspection Commission ("BIC"), which concluded that the Planning Department had properly reasserted jurisdiction over the Application prior to issuance of the building permit in order to review the Project for consistency with provisions of the Planning Code adopted and effective in 2003. The BIC specifically determined that the permit had not issued at the time that the Planning Department reasserted jurisdiction to review the Project for conformity with the Planning Code. The BIC determination effectively conditioned issuance of the Project permit on compliance with the Planning Code and all other applicable law, as is required by San Francisco Building Code § 106.4.3. The second cause of action challenges a decision by the San Francisco Board of Appeals ("BOA") upholding the Zoning Administrator's request that the Department of Building Inspection ("DBI") route all future permits and correspondence to the Planning Department, and notification of the Petitioner that the Project would be reviewed for consistency with Planning Code provisions relating to the Dogpatch Historic

District. Both of the challenged City actions stem from the City's application of Planning Code Section 312, Article 10 and Appendix L to the Project.

Challenges to local planning decisions, to the reasonableness or legality of conditions imposed on any permit, and to determinations by the Zoning Administrator and the BOA are all governed by the 90-day statute of limitations set forth in Government Code § 65009(c). That section provides that "no action or proceeding shall be maintained in [any such case] by any person unless the action or proceeding is commenced *and service is made*" on the administrative agency within 90 days after that body's decision (emphasis added). Here, the BIC's determination was final as a matter of law on May 8, 2006, and the BOA decision was final on June 14, 2006. Although Petitioner filed his original petition on August 4, 2006, Petitioner never served that petition on the City. Instead, the First Amended Petition was filed on September 12, 2006, and was served on the Mayor's Office in compliance with San Francisco Charter § 3.100 on September 27, 2006. This service was effected 142 days after the BIC decision was final, and 105 days following the final BOA decision. Section 65009 serves as an absolute jurisdictional bar to Petitioner's challenges to the City's determinations.

For the reasons set forth herein, the Amended Petition should be dismissed in its entirety and without leave to amend.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. THE PROPOSED PROJECT.

The site of the proposed Project in this case is 1179-89 Tennessee Street (the "Property") [Amended Petition at ¶1], located in the Dogpatch Historic District of the City. [*Id.* at ¶11 and Exh. A, Exh. B ¶5.] Petitioner's predecessor in interest on the Property filed an application to construct a four-story residential and commercial project on the site in 1999. [Amended Petition at ¶2.] Thereafter, Petitioner rescinded its sales contract with the previous owner, and assumed all rights and obligations under the Application in 2000. [*Id.*] Over the course of the next five years, Petitioner pursued the Application sporadically, as his personal circumstances (including the death of a family member) permitted. [*Id.* at ¶2 and Exh. B at p. 2, ¶2.] During that time, the Planning Department reviewed and approved various aspects of the Project, including the addenda drawings.

[Amended Petition at ¶3.] The Planning Department review of and revisions to the addenda drawings continued through mid-November, 2005. [*Id.*]

II. AMENDMENT OF THE PLANNING CODE APPLICABLE TO NEW CONSTRUCTION IN THE DOGPATCH HISTORIC DISTRICT.

In 2003, while the application was pending, the San Francisco Board of Supervisors adopted legislation designating the Dogpatch Historic District and requiring review of all projects proposed in the district for consistency with Appendix L (Dogpatch Historic District) to Article 10 (Preservation of Historical Architectural and Aesthetic Landmarks) of the Planning Code ("Appendix L"). [*Id.* at ¶6.] Article 10 requires, among other things, that

(a) No person shall carry out or cause to be carried out on a designated landmark site or in a designated historic district any construction ... for which a City Permit is required, except in conformity with the provisions of this Article 10. In addition, no such work shall take place unless all other applicable laws and regulations have been complied with, and any required permit has been issued for said work.

....

(c) The Central Permit Bureau shall not issue, and no other City department or agency shall issue, any permit for construction ... in an Historic District, except in conformity with the provisions of this Article 10. In addition, no such permit shall be issued unless all other applicable laws and regulations have been complied with.

....

(e) After receiving a permit application from the Central Permit Bureau in accordance with the preceding subsection, the [Planning] Department shall ascertain whether Section 1006 requires a Certificate of Appropriateness for the work proposed in such permit application. ... *If such Certificate is required and has not been issued, or if in the sole judgment of the Department the permit application does not conform, the permit application shall be disapproved or held by the Department until such time as conformity does exit; the decision and action of the Department shall be final.*

....

(Planning Code §1005, subs. (a), (c), and (e) (emphasis added).) Section 1006 of the Planning Code, in turn, requires a Certificate of Appropriateness in the case of "[a]ny construction ... for which a City permit is required ... in a historic district." (Planning Code §1006.) Section 1006.2 provides that the Planning Commission shall hold a public hearing on all applications for a Certificate of Appropriateness.

1 The Amended Petition and exhibits thereto reveal that Appendix L was effective as of April
2 18, 2003, and that the Planning Department had not completed its review of the application for
3 compliance with the revisions to the Planning Code relating to projects within the Dog Patch
4 Historic District as of December 2005. [See e.g., Amended Petition at Exhs. A-C.]

5 **III. CITY REVIEW OF THE APPLICATION FOR CONSISTENCY WITH**
6 **APPENDIX L.**

7 Petitioner admits that the reason for bringing the present action is to avoid what Petitioner
8 views as the inequitable requirement that the Project "obtain review and approvals" based on
9 Planning Code provisions adopted during the pendency of the Application [*id.* at ¶ 10], and that the
10 Project be in "compliance with later enacted procedural requirements." [*Id.* at ¶ 12.] The Amended
11 Petition reveals that the Project has not been reviewed for compliance with Article 10 of the
12 Planning Code, Petitioner has not applied for or received the required Certificate of Appropriateness
13 and the 1999 Negative Declaration for the Project has not been reviewed for adequacy in light of the
14 subsequent identification of historic resources and delineation of a new historic district. Instead,
15 Petitioner concedes that between November 14 and December 2, 2005, the Planning Department
16 concluded that it had not completed review of the Project for consistency with the standards set
17 forth in Appendix L, and reasserted jurisdiction over the permit application. [*Id.* at ¶4; *see also*
18 Exh. A, Exh. B. at ¶5.] Petitioner was notified of this determination by City personnel on
19 December 2, 2005, and again on January 5, 2006. [*Id.* at ¶4 and Exh. A.] On March 6, 2006, the
20 Zoning Administrator (ZA) formally requested that DBI "route any and all building permit
21 applications, renewals, extensions addendums, or revisions for the subject property to the Planning
22 Department for review," [*Id.* at Exh. C], explaining that the "Planning Department will review [the
23 Project application] for consistency with the Planning Code . . . including the adequacy of past
24 environmental reviews . . . and regulations of the Dogpatch Historical District within Article 10 of
25 the code." [*Id.*]

1 **IV. ADMINISTRATIVE APPEALS OF THE PLANNING DEPARTMENT'S ACTION.**

2 **A. APPEAL OF THE REASSERTION OF PLANNING DEPARTMENT**
 3 **JURISDICTION TO THE BUILDING INSPECTION COMMISSION.**

4 In January 2006, Petitioner filed an appeal with the BIC challenging the Planning
 5 Department's reassertion of jurisdiction over the Application. [*Id.* at ¶ 9.] After a full hearing, the
 6 BIC denied the appeal. [*Id.*] Petitioner made a request for rehearing by the BIC, which was also
 7 denied. [*Id.*] The BIC adopted its findings supporting the decision and upholding the actions by
 8 Planning and DBI staff on May 1, 2006, specifically finding as follows:

9 The Planning Department acted properly in reasserting its jurisdiction over
 10 the permit because, under San Francisco Building Code Section 106.4.3, a
 11 building permit issued in violation of the Planning Code – or any City
 12 Ordinance – would not be valid. The Planning Department is the City agency
 13 charged with determining whether building permits comply with the Planning
 14 Code.

15

16 ...DBI's Central Permit Bureau never issued the site permit for the Project.
 17 No permit was delivered to the Appellant Carroll or his agent. Sign-offs by
 18 various City Departments on Appellant's final plans and other structural
 19 details that are needed before a permit can issue are not "issuance" of a
 20 permit.

21

22 Because DBI's Central Permit Bureau did not yet issue a permit to Appellant
 23 Carroll, Appellant has no vested right to undertake the Project and DBI has
 24 no further jurisdiction pending Planning Department action on the matter.

25 [*Id.* at Exh. B, p. 2 at ¶6, p. 2-1 at ¶¶ 1-3.] The BIC served its written findings on Petitioner by mail
 26 on May 8, 2006. [*Id.* at ¶ 9.]

27 **B. APPEAL OF THE ZA DETERMINATION TO THE BOARD OF APPEALS.**

28 Petitioner appealed the ZA's request that documents relating to the Application be routed
 directly to the Planning Department to the BOA on March 21, 2006. [*Id.* at ¶22.] The BOA
 Agenda for the meeting provided notice that Government Code § 65009 would apply to any court
 challenges of determinations reached in the noticed hearings. [Request for Judicial Notice in
 Support of Demurrer ("RJN") at Exh. A.] After a hearing on May 17, 2006, the BOA denied the
 appeal and upheld the ZA determination. [*Id.* at ¶ 24] Petitioner's subsequent request for rehearing
 was heard and denied on June 14, 2006, and the BOA mailed its Notice of Decision and Order on
 June 16, 2006. [*Id.* at ¶24] The Notice of Decision and Order included written notice to Petitioner

that any court challenges to the BOA's determination would be governed by the statute of limitations set forth in Code of Civil Procedure §1094.6. [*Id.* at Exh. D, p. 1.]

V. COMMENCEMENT OF THE WRIT ACTION.

Petitioner filed an initial petition in this case on August 4, 2006. [*See* Amended Petition at p. 1.] That petition was never served on the City. Instead, Petitioner filed its Amended Petition on September 12, 2006. Summons was issued, and the Amended Petition served on the City through the Office of the Mayor as required by San Francisco Charter § 3.100, on September 27, 2006. [*See* RJN at Exh. B.]

ARGUMENT

I. LEGAL STANDARD.

This Court applies Part Two of the Code of Civil Procedure, including the demurrer rule set out in C.C.P. § 430.10, to writ actions brought under C.C.P. § 1094.5 (C.C.P. § 1109.) Section 430.10(e) of the Code allows a responding party to demur on grounds that "[t]he pleading does not state facts sufficient to constitute a cause of action." "In determining if a [petition] is subject to demurrer, the court considers not only the face of the complaint but any facts judicially noticed." (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 895.) Facts appearing in exhibits attached to the petition are also accepted as true. (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.) Although the Court assumes the truth of all facts properly pleaded, it "will not, however, assume the truth of contentions, deductions or conclusions of fact or law ... and may disregard allegations that are contrary to the law or to a fact of which judicial notice may be taken." (*Wolfe v. State Farm & Casualty Insurance Co.* (1996) 46 Cal.App.4th 554, 560 [citation omitted].)

II. THE AMENDED PETITION FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

Both claims set forth in the Amended Petition seek relief from compliance with the requirements of Article 10 generally, and with Appendix L in particular, and from review of previous environmental analysis under the California Environmental Quality Act ("CEQA") for

adequacy in light of the subsequent identification of historic resources and delineation of a new historic district in the Project area. Petitioner offers the conclusory assertion that its "Application was deemed complete and approved prior to the enactment of Appendix L and not subject to any procedural requirements of Article 10." [Amended Petition at ¶7.] Whether an application is "complete" is not, however, relevant to a determination of which version of the Planning Code applied to Petitioner's Application. Petitioner further asserts that requiring the Project to comply with changes in the Planning Code adopted subsequent to the filing of its Application would "require Petitioner to go through further procedural hoops such as submitting a further application for substantive reviews...." [*Id.* at ¶10.] In other words, Petitioner wishes to avoid filing an application for Certificate of Appropriateness as required by Article 10. Finally, Petitioner objects to an interpretation of the Planning Code that would require Petitioner to "obtain review and approvals for the Project based on all newly adopted ordinances and requirements" adopted between the filing of its Application and issuance of the final permit. [*Id.*] None of these arguments support Petitioner's claims for relief. Rather, the Amended Petition clearly evidences that the Project is subject to the requirements of Article 10 and Appendix L, that the Project has not received a Certificate of Appropriateness, and that this action must therefore be dismissed.

While Petitioner's Application has remained pending for roughly six years, that fact does not excuse Petitioner from the long line of applicable legal authority requiring the Project to comply with a change in law up to (and sometimes even after) the date on which the project permit is issued. Applying the current Planning Code to the Project at issue in this case mandates dismissal of this action for failure to state a claim.

A. Petitioner is Not Entitled to Issuance of A Permit in Violation of the Planning Code.

It is long settled law in this state that building projects must comply with the Planning Code in effect at the time of permit issuance. (*Wells Fargo Bank v. Town of Woodside* (1983) 33 Cal.3d 379; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110; *Russian Hill Improvement Assoc. v. Board of Permit Appeals* (1967) 66 Cal.2d 34.) This rule extends even to changes in the law adopted *after* initial administrative decision on a permit.

[T]he mere application for a building permit or the submission of plans which comply with the law in existence at the time of such submission do not entitle an applicant to the issuance of the permit if, in the interim between administrative denial of the permit and the appeal from that denial, an ordinance has been enacted which would prohibit the project contemplated.

(*Selby Realty Co.*, 10 Cal.3d at 125.) In fact, "even a permit which [has] achieved administrative finality can be revoked on the basis of a subsequent change in the zoning laws." (*West Coast Advertising v. City and County of San Francisco* (1967), 256 Cal.App.2d 357, 360.) This concept has been specifically applied to the decisions of San Francisco's Board of Appeals (formerly known as the Board of Permit Appeals) which, "in its *de novo* review is bound to apply the zoning ordinances in effect at the time of its final decision, not those in force at the time of preliminary proceedings before any subordinate agency." (*Russian Hill Improvement Assn.*, 66 Cal.3d at 46.) As a result, the Planning Department, the BIC and the BOA were each required to apply the Planning Code, including Article 10 and Appendix L, to the Project at the time of their respective reviews of the Application. If the permit had been issued without the required Certificate of Appropriateness and Planning Commission review, the permit would have been invalid as a matter of law. (S.F. Building Code § 106.4.3; *Land Waste Management*, supra, 222 Cal.App. 3d at 958.)¹

Similarly, reviewing courts must apply the law in existence at the time of their decision, rather than at the time that a permit is issued or denied. (*Wells Fargo Bank*, 33 Cal.3d at 385; *Selby Realty Co.*, 10 Cal.3d at 110.)

It is the prevailing rule that a reviewing court will apply the law in existence at the time of its decision rather than at the time the permit was denied. [cite.] The purpose of this rule is to prevent an appellate court from issuing orders for the construction of improvements contrary to presently existing legislative provisions. [Cite.] Indeed, even after a permit has been issued, it may be revoked by an administrative body on the basis of a subsequent change in the zoning laws unless the permittee has made substantial improvements in good faith reliance on the permit.

¹ Building Code §106.4.3 provides:

The issuance of a permit or approval of plans and specifications shall not be construed to be a permit for, or an approval of, any violation of the provisions of this code or of any other applicable laws and regulations. Permits presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid.

(*Selby Realty Co.*, 10 Cal.3d at 110.) Where, as here, no permit has issued, there can be no substantial reliance thereon to shield the Petitioner from the prevailing rule. (*West Coast Advertising v. City and County of San Francisco* (1967), 256 Cal.App.2d 357, 360.) Nor can Petitioner satisfy the only recognized exception to the rule, which is limited to cases where a subsequent ordinance is enacted with the specific purpose of frustrating the developer's plan. (See *Selby Realty Co.*, 10 Cal.3d at 126, fn. 11.) As a result, Petitioner is not entitled to issuance of the permit he seeks as a matter of law.

"As stated in [*Landi v. County of Monterey* (1983) 139 Cal.App.3d 934,936-937], the grant of a land-use permit or variance is an adjudicatory act, rather than a legislative one. [Citations.] Adjudicatory decisions must be consistent with applicable land-use legislation. [Citations.] Thus, local government entities cannot issue land-use permits that are inconsistent with controlling land-use legislation, as embodied in zoning ordinances and general plans." (*Land Waste Management, supra*, at 957-58.) Instead, "a land-use permit which is inconsistent with existing zoning ordinances can be issued by a responsible administrative entity only after the applicable ordinances have been amended by the legislative process." (*Id.* at 959.) In short, "[u]nder established law, local government agencies are *powerless* to issue land-use permits which are inconsistent with governing legislation." (*Id.* at 959, citing *Orinda Assn. v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1161-1162, 1167-1169.) This Court simply cannot grant Petitioner the relief he seeks—issuance of a permit in violation of San Francisco's Planning and Building Codes.

B. Even if the Project Were in Compliance With the Planning Code, Petitioner is Not Entitled to Issuance of a Permit as a Matter of Right.

In support of his claims herein, Petitioner asserts that the refusal of the Central Permit Bureau to issue Petitioner a permit "was in excess of its jurisdiction as DBI had no discretion regarding the delivery of the permit" [Amended Petition at 3:21-23], that Petitioner "had a vested right to delivery of the permit upon compliance with the applicable codes and substantive requirements thereof" [*id.* at 4:8-9], and that "delivery of the permit after it was approved as complying with the substantive requirements of the Building and Planning Codes is a ministerial

act." [*Id.* at 7:16-17.] Petitioner's claims misunderstand the nature of the permitting authority granted to both the Building and Planning Departments of the City.

The discretionary nature of all permits issued by the City is well settled under California law. Section 26 governs issuance of all such permits, including those issued by DBI. (*Guinnane v. San Francisco City Planning Commission* (1989) 209 Cal.App.3d 732, 738 n.4.) That Section provides:

In the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked.

(S.F. Bus. & Tax. Reg. Code § 26.) In 1943, the California Supreme Court held unequivocally that Section 26 grants the City discretion over all permits: "[Section 26] is . . . comprehensive language affecting the issuance of all permits sought under authority of the relevant San Francisco Charter and ordinance provisions [that] in plain terms vests the granting power with a 'sound discretion' generally." (*Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 311 [emphasis original].) Similarly, the Court of Appeals has repeatedly rejected arguments that the issuance of permits in the City is a ministerial act. In *Guinnane*, the court considered a building permit applicant's contention—identical to the argument advanced here—that his building permit application must be ministerially granted as long as it complied with the City's zoning and building codes. (*Guinnane, supra* 209 Cal.App.3d at 737.) The court found this argument "unsound" and held that no permit issued by the City is ministerial because "the city, acting through the [San Francisco] Planning Commission and the [San Francisco] Board of Permit Appeals, was empowered to exercise discretionary review and to determine that the proposed residential development was unsuitable for the indicated location." (*Id.* at pp. 737, 745.)

As a corollary to this longstanding principle, courts will not compel issuance of a permit that is subject to such discretion. In other words, the courts will not compel a *particular exercise of* discretion, since it

would do violence to the language and history of section 26 for a court to usurp the City's discretion by concluding in advance of administrative review

that, as a matter of law, a particular permit application will not have an adverse effect on the public health, safety or general welfare. Absent the exercise of section 26 administrative discretion, the issue of the limits of the City's section 26 powers over [a project] is not ripe for review.

(*Martin, supra* at 407.) This reasoning is consistent with the general rule that a writ of mandamus cannot be employed to compel a public agency possessing discretionary power to act in a particular manner. (*Lindell, supra*, at 315.) As a result, even if Petitioner could establish that his proposed Project complies in all respects with applicable provisions of the Building and Planning Codes, this Court cannot grant him the relief he seeks. "[W]hile circumventing the planning authorities in the exercise of their section 26 discretion might be viewed as a concession to the shortness of life, it is not one countenanced by the law." (*Martin, supra* at 407.)

III. THE AMENDED PETITION IS TIME BARRED PURSUANT TO GOVERNMENT CODE SECTION 65009.

A. The Building Inspection Commission and Board of Appeals Determinations are Subject to the Statute of Limitations Set Forth in Government Code § 65009

Petitioner seeks peremptory writs overturning decisions by the BIC and the BOA pursuant to Code of Civil Procedure §§ 1085 and 1094.5. [Amended Petition at 1.] The statute of limitations applicable to these claims is set forth in Government Code § 65009, which applies a 90-day limitations period to all claims challenging local planning decisions, Zoning Administrator determinations, and all decisions of the BIC. Thus, under Government Code § 65009(c)(1), Petitioner had 90 days following each of the two challenged decisions to file and serve a petition attacking that decision. Although the BIC adopted its findings on May 1, 2006, and served those findings on Petitioner on May 8, 2006 [Amended Petition at ¶ 9], Petitioner failed to serve its original Petition on the City, filed its Amended Petition on September 12, 2006 (117 days after the BIC determination became final), and first effected service on the City on September 27, 2006 (142 days after the BIC decision became final). [RJN at Exh B.] Similarly, the BOA decision became final when that entity denied Petitioner's request for rehearing on June 14, 2006. (Code of Civ. Proc. §1094.6(b).) The Agenda for the BOA hearing had contained written notice that any court challenge to decisions made at such hearing would be subject to § 65009. [RJN at Exh. A.] Similarly, the Notice of Decision and Order issued by the BOA provided notice that such court challenge must be filed within the statutory period set forth in Code of Civil Procedure §1094.6.

1 Despite these notices, the Amended Petition was not effectively served on the City as required by
 2 the Charter until 105 days after the BOA decision became final.

3 Government Code Section 65009, subdivision (c)(1)(E), provides that the 90-day statute of
 4 limitations applies to actions seeking "[t]o attack, review, set aside, void or annul any decision on
 5 the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or
 6 validity of any condition attached to a variance, conditional use permit, or any other permit."
 7 Subdivision (c)(1)(F) similarly imposes a 90-day limitations period on "any of the proceedings,
 8 acts, or determinations taken, done, or made prior to any of the decisions listed in [subparagraph
 9 (E).]" Section 65901, in turn, applies to determinations by the City's Zoning Administrator (Gov't
 10 Code § 65901), and §65903 applies to determinations by the City's Board of Appeals. (Gov't Code
 11 §65903.) After the expiration of this time period, "all persons are barred from any further action or
 12 proceeding." (Gov't Code § 65009(e); *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765.)

13 **B. Limitations Statutes On Actions Challenging Local Planning Decisions Are**
 14 **Strictly Construed.**

15 The purpose of Government Code § 65009 is "to provide certainty for property owners and
 16 local governments regarding decisions made pursuant to this division." (Gov't Code § 65009(a)(3).)
 17 A central aim of the Legislature in adopting § 65009 was to allow "governmental zoning decisions
 18 ... to take effect quickly." (*Ching v. San Francisco Bd. of Permit Appeals* (1998) 60 Cal.App.4th
 19 888, 893; cf. *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 7.) As the *Ching* court explained, the
 20 90-day statute of limitations was enacted "to ensure that the validity of local public agency
 21 decisions would be judicially determined as expeditiously as possible because any delay ... is
 22 ultimately reflected in increased costs to the public." (*Ching, supra*, 60 Cal. App. 4th at 893.) By
 23 enacting this short limitations period, the Legislature intended "to provide certainty for property
 24 owners and local governments regarding [local zoning and planning decisions]." (Gov't Code §
 25 65009 (a)(3).) In light of these policies, courts have held that the time limits of § 65009 are to be
 26 strictly construed. (*Wagner v. City of South Pasadena* (2000) 78 Cal.App.4th 943, 950 [emphasis
 27 added] [quoting *Maginn v. City of Glendale* (1999) 72 Cal.App.4th 1102, 1109].) Thus, "[T]he
 28 courts have consistently enforced the 90-day limit." (*Ching, supra*, 60 Cal.App.4th at 893.)

Even a minor extension of § 65009's 90-day limitations period would impermissibly undermine the statute's purpose of providing certainty for local government decisions. Thus, in *Wagner, supra*, 78 Cal.App.4th 943, the Court of Appeal held that the five-day extension of time for mail service found in Code of Civil Procedure § 1013(a) should not be applied to extend the time for service of an action on a local government body under § 65009(c)(1). This was so in part because even a five-day extension would have undermined "the ends of certainty and promptitude" embodied by the 90-day limit. (*Wagner, supra*, 78 Cal.App.4th at 949.)

In this case, Petitioner filed its initial Petition on the City within 90 days of the BIC's determination, but *never served that Petition on the City*. Petitioner then filed its Amended Petition on the 117th day after the BIC decision became final, and on the 90th day after the BOA decision became final. Petitioner finally served the Mayor's Office with summons and the Amended Petition on September 27—142 days after the BIC decision became final, and 105 days after the BOA decision became final. As a result, the Court should sustain the City's demurrer and, because Petitioner cannot amend its Petition to demonstrate compliance with § 65009, Petitioner should not be granted leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [if there is no reasonable probability a pleading defect can be cured by amendment, leave to amend should not be granted].)

CONCLUSION

For the foregoing reasons, the allegations of the Amended Petition including exhibits thereto, and those facts of which this Court may take judicial notice, show that the claims for relief set forth in the Amended Petition are untimely as a matter of law, and fail to state facts sufficient to constitute a cause of action. On that basis, the City respectfully submits that its demurrer should be sustained without leave to amend as to both claims for relief set forth in the Amended Petition.

1 Dated: May 9, 2007

2 DENNIS J. HERRERA
3 City Attorney
4 KRISTEN A. JENSEN
5 THOMAS LAKRITZ
6 CHRISTINE VAN AKEN
7 Deputy City Attorneys

8 By:

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10 KRISTEN A. JENSEN

11 Attorneys for Defendant
12 CITY AND COUNTY OF SAN FRANCISCO
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PROOF OF SERVICE

I, REYNA LOPEZ, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On May 9, 2007, I served the following document(s):

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO
AMENDED PETITION FOR WRIT OF MANDATE AND ADMINISTRATIVE
MANDAMUS**

on the following persons at the locations specified:

Margaret A. Seltzer, Esq.
Seltzer Law Group
425 California Street, Nineteenth Floor
San Francisco, CA 94104-2296

in the manner indicated below:

☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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☐ **BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number (415) 554-4757 to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report ☐ is attached or ☐ will be filed separately with the court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed May 9, 2007, at San Francisco, California.


REYNA LOPEZ

Exhibit 9

DENNIS J. HERRERA, State Bar #139669
City Attorney
KRISTEN A. JENSEN, State Bar #130196
THOMAS S. LAKRITZ, State Bar #161234
CHRISTINE VAN AKEN, State Bar #241755
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
Telephone: (415) 554-4615
Facsimile: (415) 554-4757
E-Mail: kristen.jensen@sfgov.org

ENDORSED
FILED
San Francisco County Superior Court

JUL 3 2007

GORDON PARK-LI, Clerk
BY BERNADETTE THOMPSON
Deputy Clerk

Attorneys for Respondent
CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

TRUST OF REGAN CARROLL,
REGAN CARROLL, TRUSTEE

Petitioner,

vs.

CITY AND COUNTY OF SAN
FRANCISCO DEPARTMENT OF
BUILDING INSPECTION, CITY AND
COUNTY OF SAN FRANCISCO
BUILDING INSPECTION
COMMISSION, CITY AND COUNTY
OF SAN FRANCISCO PLANNING
DEPARTMENT, CITY AND COUNTY
OF SAN FRANCISCO BOARD OF
APPEALS,

Respondents.

Case No. CPF-06-506542

REPLY MEMORANDUM IN
SUPPORT OF DEMURRER TO
AMENDED PETITION FOR WRIT OF
MANDATE AND ADMINISTRATIVE
MANDAMUS

Hearing Date: July 11, 2007
Hearing Judge: Hon. Patrick J. Mahoney
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 12, 2006
Trial Date: None Assigned

Respondent City submits this reply memorandum in support of its demurrer to the Amended Petition for Writ of Mandate (etc.) ("Amended Petition"), filed herein on September 12, 2006.

INTRODUCTION

Petitioner's Opposition to Demurrer (etc.) ("Opposition") responds to the City's arguments with a mixture of misstated facts, and a failure to address the fundamental legal defect that infects the entire Amended Petition. First, the Opposition repeatedly suggests that the City had already "issued" the building permit for Petitioner's Project, then "snatched" it back when the Planning Department determined that the Project did not comply with Article 10 and Appendix L of the Planning Code related to building requirements in the Dogpatch Historic District. [See generally Opposition at 1-2.] The Amended Petition itself reveals the fallacy of this assertion. Specifically, the exhibits to the Amended Petition clearly demonstrate that no permit was ever issued for the Project. [Id. at Exh. B.] More revealing, however, is the Petitioner's failure to address head on the fundamental legal flaw underlying each of the theories articulated in the Amended Petition: the permit Petitioner seeks would violate the Planning Code, and thus its issuance cannot be compelled by this Court under any theory.

Petitioner never refutes the City's premise that: "Under established law local government agencies are *powerless* to issue land-use permits which are inconsistent with governing legislation." (*Land Waste Management v. Contra Costa Board of Supervisors* (1990) 222 Cal.App.3d 950, 959 (italics in original).) This rule extends to the courts, which leads to the well-settled principle of administrative law that, until a permit is finally granted, the Building and Planning Departments, and all administrative agencies and courts considering a permit application, must apply the Planning Code in effect at the time of review. Petitioner never addresses the fact that his entire Amended Petition is resolved by reference to the line of cases including *Russian Hill Imp. Ass'n v. Board of Permit Appeals of City and County of San Francisco* (1967) 66 Cal.2d 34, 40.

For the reasons set forth herein, the Amended Petition must be dismissed without leave to amend.

ARGUMENT

I. THE AMENDED PETITION IS TIME-BARRED PURSUANT TO GOVERNMENT CODE SECTION 65009.

Contrary to Petitioner's assertions, both of the causes of action set forth in the Amended Petition are barred by the statute of limitations set forth in Government Code §65009. The first cause of action challenges a decision by the City's Building Inspection Commission ("BIC"), which concluded that the Planning Department had properly reasserted jurisdiction over the Application prior to issuance of the building permit in order to review the Project for consistency with provisions of the Planning Code adopted and effective in 2003. The BIC specifically determined that the permit had not issued at the time that the Planning Department reasserted jurisdiction to review the Project for conformity with the Planning Code. [Amended Complaint at Exh. B, Finding 1.] The BIC determination effectively conditioned issuance of the Project permit on compliance with the Planning Code and all other applicable law, as is required by San Francisco Building Code § 106.4.3. The second cause of action challenges a decision by the San Francisco Board of Appeals ("BOA") upholding the Zoning Administrator's request that the Department of Building Inspection ("DBI") route all future permits and correspondence to the Planning Department, and notification of the Petitioner that the Project would be reviewed for consistency with Planning Code provisions relating to the Dogpatch Historic District. Both of the challenged City actions stem from the City's application of Planning Code Section 312, Article 10 and Appendix L to the Project.

A. The First Cause of Action is Governed by the Statute of Limitations Set Forth in Government Code § 65009.

Petitioner's Opposition Brief suggests that the first cause of action set forth in the Amended Petition is not subject to the statute of limitations set forth in Government Code §65009 because, the argument goes, "this is not a 1094.5 writ challenging the merits of an administrative decision" but rather "a 1085 writ that challenges the unlawful and irregular conduct of a City employee who acted without authority." [Opposition at 2:2-5.] In other words, Petitioner attempts to recast the claims set forth in the first cause of action as merely a claim to enforce a ministerial duty of the City. This attempt fails for several reasons. First, the allegations of the Amended Petition make clear that the first cause of action includes a challenge to the refusal of DBI to issue a building permit *as upheld*

by the Building Inspection Commission's decision. [Amended Petition at ¶¶ 6, 7, 9, 10, 12, 14 and Exhs. A, B.] This is precisely the "challenge to the merits of an administrative decision" that Petitioner now disclaims in the Opposition. Second, as demonstrated in the City's Memorandum in Support of this Demurrer and as discussed further in Section II.B, below, issuance of building permits is simply not a ministerial act for which relief under Section 1085 is available. Finally, whether the first cause of action seeks relief pursuant to Section 1085 or Section 1094.5 of the Code of Civil Procedure is irrelevant for purposes of the statute of limitations imposed by Government Code §65009. Rather, as noted by Petitioner, citing to *Honig v. City and County of San Francisco* (2005) 127 Cal.App.4th 520), courts must look beneath the surface of a claim to determine whether, at base, it is a challenge to the City's planning and zoning decisions. In this case, the gravamen of the first cause of action is clearly a challenge to DBI's determination not to issue a building permit because the Planning Department had determined that it did not comply with applicable provisions of the Planning Code. This claim falls squarely within the limitations provisions of Government Code §65009.

Government Code Section 65009, subdivision (c)(1)(E), provides that the 90-day statute of limitations applies to actions seeking "[t]o attack, review, set aside, void or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit." Subdivision (c)(1)(F) similarly imposes a 90-day limitations period on "any of the proceedings, acts, or determinations taken, done, or made prior to any of the decisions listed in [subparagraph (E).]" In this case, Petitioner objects because the City has refused to issue a building permit that does not comply with the provisions of the Planning Code relating to the Dogpatch Historic District. In other words, DBI conditioned issuance of the requested building permit on compliance with the Planning Code.

As discussed at length in *Honig v. City and County of San Francisco*,

The short limitations period provided by Government Code section 65009, subdivision (c) serves the important legislative purpose of permitting the rapid resolution of legal challenges to local zoning and planning decisions. [citation].

(172 Cal.App.4th at 528 (citing *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 774)(emphasis added).) In that case, the petitioner challenged the City's issuance of a building permit, and the City argued that the claim was time-barred by § 65009. Petitioner countered that issuance of a building permit is not one of the matters listed in § 65009, and therefore the limitations period provided in that section was not applicable. The Court of Appeal disagreed, holding that the petitioner's challenge to the building permit was, in effect a, challenge to the underlying variance that was governed by the 90-day limitations period provided by §65009. (172 Cal.App.4th at 528-29.)

In the present case, Petitioner's first cause of action challenges the BIC decision upholding DBI's determination that the Planning Department had properly reasserted jurisdiction over the Application because the Project did not comply with the Planning Code sections applicable to construction in the Dogpatch Historic District. [Amended Petition at ¶¶ 6, 7, 9, 10, 12, 14, and Exhs. A, B.] That determination is a "local planning decision" subject to §65009. Because Petitioner failed to serve its original Petition on the City, filed its Amended Petition on September 12, 2006 (117 days after the BIC determination became final), and first effected service on the City on September 27, 2006 (142 days after the BIC decision became final), the first cause of action is time-barred. [RJN at Exh. B.]

B. The Second Cause of Action is Governed by the Statute of Limitations Set Forth in Government Code § 65009.

Petitioner concedes that the second cause of action, challenging a determination by the Board of Appeals, is subject to the time limitations set forth in §65009. [*E.g.*, Opposition at 4:4.] This is because §65009, by incorporating §§ 65901 and 65903, clearly governs challenges to both determinations by the Zoning Administrator and decisions of the City's Board of Appeals. (*See* Gov't Code § 65901; §65903 .) After the expiration of this time period, "all persons are barred from any further action or proceeding." (Gov't Code § 65009(e); *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765.) Instead, Petitioner takes issue with the service requirements applicable in this case. Petitioner misstates the relationship between the City and its subordinate boards, commissions and departments and, therefore, misconceives the requirements for serving the City with process.

1 The City's Charter reflects that the Department of Building Inspection, the Building
 2 Inspection Commission, the Zoning Administrator and the Board of Appeals are subsidiary or
 3 subordinate entities within the City, rather than independent of the City. (*See, e.g.,* Charter § 4.106
 4 (Board of Appeals); § 4.121 (Building Inspection Commission).) While the Charter provides that
 5 the City and County "may appear, sue and defend in all courts in all matters and proceedings," there
 6 is no Charter provision providing these subordinate entities with the right to sue or be sued. Only
 7 the Mayor, in turn, is designated in the Charter to accept service of process on behalf of the City.
 8 (Charter § 3.100.)

9 Petitioner cites to two cases that are inapposite, and do not support his claim. The first,
 10 *Crumpler v. Board of Admin. Employees' Retirement System* (1973) 32 Cal.App.3d 567, involved a
 11 claim against a board that was apparently not a subsidiary of the city that employed the plaintiffs.
 12 "That proceeding being one for judicial review of the administrative decision of the board
 13 approving reclassification of petitioners, the board was the only necessary and proper party." (*Id.* at
 14 575.) Similarly, the *Guillemin* case cited in the Opposition is inapposite. In that case, the court
 15 recited multiple definitions of "public entity" to illustrate that the term is defined *differently in*
 16 *different statutory contexts* within the Government Code. "Public agency" is a term that can be
 17 reasonably interpreted to include a variety of public litigants. And the Legislature has defined
 18 public agency differently in Government Code statutes as a means of delineating the intended
 19 coverage of the statute. (Cf. §§ 6500 [joint powers agreements], FN6 31478 [county employees
 20 retirement law], FN7 53101 [local emergency telephone systems].) (*Guillemin v. Stein* (2002) 104
 21 Cal.App.4th 156, 165 fn. 7.) None of the code sections referenced in that case applies to the present
 22 action.

23 In this case, the proof of service demonstrates that the Amended Petition was served in
 24 compliance with the Charter on September 27, 2006. The BOA decision became final when that
 25 entity denied Petitioner's request for rehearing on June 14, 2006. (Code of Civ. Proc. § 1094.6(b).)
 26 Through the Agenda for the BOA hearing and the Notice of Decision and Order issued after the
 27 hearing, Petitioner was put on notice that any court challenge to decisions made at such hearing
 28 would be subject to § 65009. [RJN at Exh. A.] Nonetheless, the Amended Petition was not

effectively served on the City as required by the Charter until 105 days after the BOA decision became final. As a result, the second cause of action is also time-barred.

II. THE RELIEF SOUGHT BY THE AMENDED PETITION IS NOT AVAILABLE AS A MATTER OF LAW.

A. This Court Must Review the Permit Application in Light of Article 10 and Appendix L of the City's Planning Code.

"It is the 'prevailing rule[]' ... that, when an application for a building complied with the requirements in effect when it was filed, but in the interim between the application and the appeal from its denial, a new ordinance is enacted which would prohibit the development, 'a reviewing court will apply the law in existence at the time of its decision rather than at the time the permit was denied.' [Citation.] The purpose of the rule is to prevent an appellate court from issuing orders for the construction of improvements contrary to presently existing legislative provisions." (*Wells Fargo Bank v. Town of Woodside* (1983) 33 Cal.3d 379, 385 at fn.7 (citing *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 125).) "The only recognized exception to this rule applies to cases where a subsequent ordinance is enacted with the purpose of frustrating the developer's plans." (*Id.* (citing *Selby Realty* at p. 126, fn. 11; *Atlantic Richfield Co. v. Board of Supervisors* (1974) 40 Cal.App.3d 1059, 1063-1065).)

Petitioner does not assert that Article 10 of the Planning Code was adopted in 2003 for the purpose of frustrating *his Project*. Nor could he. Since Article 10 of the Planning Code remains in force today, this Court is bound to review the Application (and the relief requested in the Amended Petition) in light of the requirements set forth in that article, including the requirement that the Project obtain a Certificate of Appropriateness. (Planning Code § 1006.) Since the Amended Petition reveals, and Petitioner's Opposition admits, that the Project has not obtained a Certificate of Appropriateness [Amended Petition at ¶10, Exh. C; Opposition at 5:12-15], the Court must sustain the City's Demurrer without leave to amend.

Similarly, Petitioner does not challenge the "prevailing rule," nor does he suggest that the building permit he seeks would comply with Section 1006 of the Planning Code, or with Article 10, Appendix L of that Code. Rather he concedes, as he must, that the law even permits revocation of issued permits based on subsequent changes to the Planning Code. [Opposition at 4:22-26.] He also

1 concedes again that he has not obtained the Certificate of Appropriateness required by the Planning
 2 Code for all construction in the City's historic districts. [Opposition at 12-13.] Nonetheless he
 3 argues that in this case, "the proper administrative body did not revoke the permit" and, in any
 4 event, that he is entitled to an exemption from this rule because he has made substantial
 5 improvements in good faith reliance on the permit. [Opposition at 4:27-5:3.] Finally, he argues—
 6 without citation to authority—that Planning Code Section 1006, Article 10 and Appendix L are not
 7 "a zoning ordinance." [Opposition at 12-14.] These arguments miss the mark in every respect.

8 As to Petitioner's first argument, the Amended Petition and its exhibits reveal that no permit
 9 was ever issued for his Project. [Amended Petition at Exh. C, Finding 1.] As a consequence, such
 10 permit has not been "revoked" by the Planning Department.

11 Second, the law is clear that the "vested rights" exception that Petitioner hopes to rely on
 12 does not apply where *no permit has issued*. Rather, where no permit has issued, there can be no
 13 substantial reliance to shield the Petitioner from the prevailing rule. (*West Coast Advertising v. City*
 14 *and County of San Francisco* (1967) 256 Cal.App.2d 357, 360.)

15 Finally, Petitioner's third and most confusing argument—that the Planning Code Sections
 16 governing construction in historic districts generally, and the Dogpatch Historic District in
 17 particular, are not "zoning ordinance[s]"—also fails. Article 10 of the Planning Code regulates the
 18 uses that may be made of sites located within designated historic districts. [See, e.g., Planning Code
 19 §§ 1001, 1005, 1006.] Any project proposed for such a site that has not obtained a Certificate of
 20 Appropriateness may not be constructed in the District. [Planning Code §1005.] The fact that
 21 restrictions placed on construction in such districts are focused on the historic character of existing
 22 structures within the designated districts—or what Petitioner refers to as "aesthetics"—does not
 23 render those requirements elective. Article 10 was adopted to further the following goals:

24 It is hereby found that structures, sites and areas of special character or
 25 special historical, architectural or aesthetic interest or value have been and
 26 continue to be unnecessarily destroyed or impaired, despite the feasibility of
 27 preserving them. It is further found that the prevention of such needless
 destruction and impairment is essential to the health, safety and general
 welfare of the public. The purpose of this legislation is to promote the health,
 safety and general welfare of the public....

(Planning Code §1001.) Such goals are recognized to be well within the reach of the government's zoning authority and, in fact, the United States Supreme Court has found that

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

(*Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 6.)

Nor does Petitioner's citation to the case of *Martin v. City and County of San Francisco* aid in his cause. Petitioner cites the *Martin* case for the proposition that Article 10 of the Planning Code does not regulate the interiors of structures in designated historic districts. [Opposition at 5:21-22.] But Petitioner offers no insight into the relevance of that observation. No citation to case law is offered to suggest that planning, zoning and land use regulations aimed at preserving the historic character of neighborhoods are somehow excluded from the "prevailing rule" articulated above. Nor is the City aware of any case supporting such a counter-intuitive proposition. Similarly, the bald assertion that "zoning laws regulate the interior of proposed structures, not just the facades" is also unsupported and insupportable. Rather than bolstering these assertions, the *Martin* court explained emphatically that "[w]ithout question, the preservation of San Francisco's architectural history is an important policy goal," a goal that is expressly addressed by Article 10.

(*Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 392, 405.)

B. Issuance of Building Permits is a Discretionary Act Not Susceptible to Relief Pursuant to Code of Civil Procedure §1085.

Petitioner's Opposition concedes that Section 26 of the Business & Taxation Regulation Code gives the City discretion to issue or deny building permits. [Opposition at 6:2-3.] The Opposition then suggests, without supporting facts or law, that refusal to issue a permit until Planning Department review for compliance with applicable sections of the City's Landmark

1 Preservation ordinances is an abuse of that discretion. As noted above and in the City's moving
 2 papers, the broad provisions of §26 prohibit this Court from granting the relief sought in the
 3 Amended Petition.

4 In particular, writ relief pursuant to Code of Civil Procedure §1085 is not available to
 5 compel the City to perform a discretionary act. A traditional writ of mandate under §1085 is
 6 available to compel the respondent to perform a *ministerial duty* in cases where the petitioner has a
 7 clear, present and beneficial right to performance. (*Conlan v. Bonta* (2002) 102 Cal.App.4th 745,
 8 748; *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 618.) Plaintiff cannot
 9 allege that the City has a ministerial duty to issue, deny or rescind a building permit. Rather, the
 10 case law makes clear that issuance of building permits in the City is a discretionary—not a
 11 ministerial—act. Plaintiff's claim for relief pursuant to Code of Civil Procedure §1085 must
 12 therefore fail as a matter of law.

13 The discretionary nature of all permits issued by the City is well settled under
 14 California law, and is discussed at length in the City's moving papers. [See Memorandum in
 15 Support at 10:21-12:9.] Absent the exercise of the City's discretion (that is, before a decision has
 16 been made whether to issue or deny a permit), Code of Civil Procedure §1094.5 similarly does not
 17 provide Petitioner with a vehicle for the relief sought in this case. Simply put, courts will not
 18 compel issuance, denial or rescission of a permit that is subject to such discretion. In other words,
 19 the courts will not compel a *particular exercise* of discretion, since it
 20 would do violence to the language and history of section 26 for a court to
 21 usurp the City's discretion by concluding in advance of administrative review
 22 that, as a matter of law, a particular permit application will not have an
 23 adverse effect on the public health, safety or general welfare.

24 (*Martin* at 407.) This reasoning is consistent with the general rule that a writ of mandamus cannot
 25 be employed to compel a public agency possessing discretionary power to act in a particular
 manner. (*Lindell*, *supra*, at 315.) "[W]hile circumventing the planning authorities in the exercise of
 their section 26 discretion might be viewed as a concession to the shortness of life, it is not one
 countenanced by the law." (*Martin*, *supra* at 407.)

The Amended Petition discloses that the City had not issued or denied the requested building permit at the time the BOA and BIC decisions were rendered. This Court is simply not empowered to exercise the discretion vested in the City and order that the permit be issued.

III. PETITIONER SHOULD BE DENIED LEAVE TO AMEND.

Petitioner has offered the Court no basis on which to grant leave to amend, and therefore the Demurrer should be denied without leave. The only additional "facts" offered by Petitioner go to the issue of whether Petitioner has expended substantial sums in reliance on the permit for his Project. [Opposition at 5:1-3.] Such "facts," however, would not save the Amended Petition even if true. This is because the Amended Petition clearly reveals that *no permit was issued* in this case. Where no permit has issued, the "vested rights" exception set forth in *Selby Realty*, cited above, cannot apply.

CONCLUSION

For the foregoing reasons and those set forth in the City's moving papers, the allegations of the Amended Petition including exhibits thereto, and those facts of which this Court may take judicial notice, show that the claims for relief set forth in the Amended Petition are untimely as a matter of law, and fail to state facts sufficient to constitute a cause of action. On that basis, the City respectfully submits that its demurrer should be sustained without leave to amend as to both claims for relief set forth in the Amended Petition.

Dated: July 3, 2007

DENNIS J. HERRERA
City Attorney
KRISTEN A. JENSEN
THOMAS LAKRITZ
CHRISTINE VAN AKEN
Deputy City Attorneys

By: 
KRISTEN A. JENSEN

Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO

PROOF OF SERVICE

I, REYNA LOPEZ, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On July 3, 2007, I served the following document(s):

**REPLY MEMORANDUM IN SUPPORT OF DEMURRER TO AMENDED PETITION
FOR WRIT OF MANDATE AND ADMINISTRATIVE MANDAMUS**

on the following persons at the locations specified:

Andrew M. Zacks, Esq.
ZACKS UTRECHT & LEADBETTER, PC
235 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 956-8100

in the manner indicated below:

☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. A declaration from the messenger who made the delivery ☐ is attached or ☐ will be filed separately with the court. (Susan Zemsky, Esq.)

☐ **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

☐ **BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number (415) 554-4757 to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine, and a copy of the transmission report ☐ is attached or ☐ will be filed separately with the court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed July 3, 2007, at San Francisco, California.


REYNA LOPEZ

Exhibit 10

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): James B. Kraus, SBN 184118 415-956-8100		TELEPHONE NO.: 415-956-8100	FOR COURT USE ONLY
Zacks, Utrecht & Leadbetter, PC 235 Montgomery Street, Suite 400 San Francisco, CA 94104			
ATTORNEY FOR (Name): Plaintiff Regan Carroll Trust Insert name of court and name of judicial district and branch court, if any: San Francisco Superior Court Unlimited Civil Jurisdiction			
PLAINTIFF/PETITIONER: Regan Carroll Trust, Regan Carroll, trustee, DEFENDANT/RESPONDENT: City and County of San Francisco, San Francisco Board of Appeals,			
REQUEST FOR DISMISSAL <input type="checkbox"/> Personal Injury, Property Damage, or Wrongful Death <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <input type="checkbox"/> Family Law <input type="checkbox"/> Eminent Domain <input checked="" type="checkbox"/> Other (specify): Petition for Writ of Mandate		CASE NUMBER: 506542	
- A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -			

1. TO THE CLERK: Please dismiss this action as follows:

- a. (1) ☐ With prejudice (2) ☒ Without prejudice
- b. (1) ☒ Complaint (2) ☒ Petition
 (3) ☐ Cross-complaint filed by (name):
 (4) ☐ Cross-complaint filed by (name):
 (5) ☐ Entire action of all parties and all causes of action
 (6) ☐ Other (specify):*

on (date):

on (date):

Date: 07/05/07

James B. Kraus, SBN 184118

(TYPE OR PRINT NAME OF ☒ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

* If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

☐ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross - complainant

2. TO THE CLERK: Consent to the above dismissal is hereby given.**

Date:

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

(SIGNATURE)
 Attorney or party without attorney for:

** If a cross-complaint or Response (Family Law) seeking affirmative relief is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581(i) or (j).

☐ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross - complainant

(To be completed by clerk)

3. ☐ Dismissal entered as requested on (date):
 4. ☐ Dismissal entered on (date): as to only (name):
 5. ☐ Dismissal not entered as requested for the following reasons (specify):

- ☐ a. Attorney or party without attorney notified on (date):
 b. Attorney or party without attorney not notified. Filing party failed to provide
☐ a copy to conform ☐ means to return conformed copy

Clerk, by _____, Deputy

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Andrew M. Zacks (SBN 147794) Zacks, Utrecht & Leadbetter, PC 235 Montgomery Street, Suite 400 San Francisco, CA 94104 TELEPHONE NO.: 415-956-8100 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Trust of Regan Carroll	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: CITY AND ZIP CODE: San Francisco, CA 94102 BRANCH NAME: Unlimited Civil Jurisdiction	CASE NUMBER: 506542
PETITIONER/PLAINTIFF: Trust of Regan Carroll, Regan Carroll Trustee RESPONDENT/DEFENDANT: City and County of San Francisco, et al.	
PROOF OF SERVICE—CIVIL Check method of service (only one): <input type="checkbox"/> By Personal Service <input checked="" type="checkbox"/> By Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail/Electronic Transmission	
JUDGE: DEPT.:	

(Do not use this Proof of Service to show service of a Summons and Complaint.)

1. At the time of service I was over 18 years of age and not a party to this action.

2. My address is (specify one):

a. ☒ Business: 235 Montgomery St. Suite 400 b. ☐ Residence:
 San Francisco, CA 94104

3. On (date): 07/05/07 I served the following documents (specify): Request for Dismissal

☐ The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

4. I served the documents on the persons below, as follows:

a. Name of person served: Kristin Jensen, Esq.

b. Address of person served: City Attorneys Office, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102

c. Fax number or e-mail address of person served, if service was by fax or e-mail:

d. Time of service, if personal service was used:

☐ The names, addresses, and other applicable information about the persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

The documents were served by the following means (specify):

☐ By personal service. I personally delivered the documents to the persons at the addresses listed in item 4.
 (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

CASE NAME Trust of Regan Carroll v. CCSF

CASE NUMBER:

506542

5 b. ☒ By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and (specify one):

- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☒ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

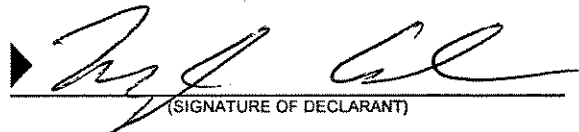
I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state):

- c. ☐ By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 4. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. ☐ By messenger service. I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 4 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)
- e. ☐ By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 4. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. ☐ By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed in item 4. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 07/05/07

Ingrid M. Karlsson
(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

(If item 5d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- ☐ By personal service. I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 4. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (date):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

Exhibit 11

2001 SAN FRANCISCO BUILDING CODE

106.4.1.3.2 – 106.4.3

structures or (2) alterations that involve a substantial increase in the envelope of an existing building or structure, to be peer reviewed for structural integrity and effect on hillside stability. The requirements herein for projects in the Northwest Mt. Sutro Slope Protection Area are in addition to all other applicable laws and regulations, including any and all requirements for environmental review under the California Environmental Quality Act; compliance with the requirements contained herein does not excuse a project sponsor from compliance with any other applicable laws and regulations.

106.4.1.3.3 Mandatory review by Structural Advisory Committee and other City officials. All permit applications submitted to the Central Permit Bureau for construction of new buildings or structures or alterations that involve a substantial increase in the envelope of an existing building or structure (as determined by the Director) within the Northwest Mt. Sutro Slope Protection Area shall be submitted to and reviewed by the Structural Advisory Committee, as defined by Building Code Section 105.6. No permits for such properties located within the Northwest Mt. Sutro Slope Protection Area shall be issued unless and until the Director has consulted with and received a written communication from representatives of the Department of Planning, Department of Public Works and Fire Department, each of whom has made a visit to the site for which the project is proposed, and the Director has received a written report from the Structural Advisory Committee concerning the safety and integrity of the proposed design and construction. As part of its review, the Structural Advisory Committee shall consider the effect that construction activity related to the proposed project will have on the safety and stability of the Northwest Mt. Sutro Slope Protection Area.

106.4.1.3.4 Mandatory denial by Director. In the event that the Structural Advisory Committee determines that there is a reasonable likelihood that the proposed design and construction would result in unsafe conditions or would increase the

likelihood of hillside instability, and such unsafe conditions or instability cannot be mitigated to the satisfaction of the Structural Advisory Committee, the Director shall deny the permit. The Director's decision to deny the permit is appealable only to the Board of Appeals.

Section 106.4.2. Replace this section with the following:

106.4.2 Retention of approved construction documents. One set of approved construction documents shall be provided to the party obtaining the permit. The owner shall be responsible for keeping these documents on the building site at all times and making them available for inspection and use by the inspector during such construction until final inspection has been made; failure to do so shall result in stoppage of work. The approved construction documents shall not be changed, modified or altered without authorization from the Director; all work shall be done in accordance with these documents.

One set of approved construction documents for all building permits shall be retained by the Department in reproducible form as public records.

Section 106.4.3. Revise this section as follows:

106.4.3 Validity of permit. The issuance of a permit or approval of plans and specifications shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of this code or of any other applicable laws and regulations. Permits presuming to give authority to violate or cancel the

2001 SAN FRANCISCO BUILDING CODE

106.4.3 - 106.4.4

provisions of this code or other ordinances of the jurisdiction shall not be valid.

- The issuance of a permit based on plans, specifications and other data shall not prevent the Director from thereafter requiring the correction of errors in said plans, specifications and other data, or from preventing building operations being carried on thereunder when in violation of this code or other applicable laws and regulations.

Section 106.4.4. Replace this section with the following:

106.4.4 Expiration. Every permit issued by the Director under the provisions of this code, unless an extension of time has been specifically approved by the Director, shall expire by limitation and become null and void when the time allowed in Table A is reached, or when any of the following circumstances is applicable: [Amended 10-7-2003 by Ord. No. 245-03]

1. If the building or work authorized by such permit is not started within 90 days from the date of such permit, except for site permits with a valuation of \$2,500,000 or more and Director-initiated code compliance permits.

2. For site permits with a valuation of \$2,500,000 or more, the work shall start within 18 months or half the time period specified in Table A, whichever is the greater amount of time.

3. For Director-initiated code compliance permits, the work shall start within 30 days from the date of such permit.

4. If the building or work authorized is suspended or abandoned at any time after the work has started, for a period as follows:

4.1 Thirty days for Director-initiated code compliance permits.

4.2 Ninety days for all other permits.

5. An extension of time from the stated periods may be permitted for good reason, provided such requests for an extension are submitted to the Chief Building Inspector in writing prior to the end of the time period accompanied by payment of a fee. Unless approved by the Director, no more than three extensions of time may be granted. Any inspections performed during the extended portion of the life of the permit will require payment of inspection fees in addition to the extension of time shall not exceed the following time periods:

5.1 One hundred eighty days for site permits with a valuation of \$2,500,000 or more.

5.2 Thirty days for Director-initiated code compliance permits with a valuation of less than \$25,000.

5.3 Ninety days for all other permits. The maximum time allowed for Director-initiated code compliance permits shall be 12 months for all permits exceeding \$25,000 total valuation.

EXCEPTION: See Table 16B-A - Program Implementation Schedule - Footnotes 2 and 3.

6. A demolition permit shall expire 180 days after issuance. Only one extension of time of 90 days shall be granted upon written request to the Director.

7. The Director may administratively authorize the processing of applications involving compliance actions initiated by the Department, in a manner other than set forth in this code, so as to effect said compliance most expeditiously; provided, however, that due process is assured all applicants. In this regard, the Director may reduce the time periods set forth in this section as they apply to a second application and permit required by the Director to effect full compliance with this code and other applicable laws and regulations if by doing so code compliance would be more expeditiously accomplished.

Exhibit 12

NOTIFICATION TO ADJOINING PROPERTY OWNERS

<u>BLOCK</u>	<u>LOT</u>	<u>SUBJECT PROPERTY</u>	<u>OWNER</u>
4172	53	1189 Tennessee St.	Regan Carroll Trust (Appellant) 721 San Bruno Avenue San Francisco, CA 94107

<u>ADJOINING PROPERTY</u>		
41	1169 Tennessee St.	1169-1177 Tennessee St., Inc. 1155 Tennessee St. SF, CA 94107
25	1193 Tennessee St.	Thomas Lundbergetal 237 Rose Ave. Mill Valley, CA 94941
38	2572 Third St.	2572-80 Third St. LLC
39	2576 Third St.	1608 Irving St.
54	2580 Third St.	SF, CA 94122

Attorney for Appellant: Thomas Lippe, 329 Bryant St., #3D, SF, CA 94107. Tel: 777-5600
Fax: 777-9809.

Feb. 14, 2007: Upon motion by Comm. Fung, the Board voted 4-0-1
(Pres. Knox absent) to reschedule the matter to
March 7, 2007.

March 21, 2007: Request for Rehearing will be considered by the Board of Appeals
at its regular meeting of April 4, 2007.

April 4, 2007: Upon motion by Comm. Fung, Board voted 4-0-1 (Haaland
absent) to continue for one year to be heard on April 2
2008.

Post Cards Mailed 12/29/06

Index Cards Filed 12/29/06

Letter Notices Mailed 12/28/06 Notice sent to departments and appellant.